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IN THE SUPREME COURT OF THE UNITED STATES
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PUD NO. 1 OF JEFFERSON COUNTY AND
THE CITY OF TACOMA,

PETITIONERS

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES
AND DEPARTMENT OF WILDLIFE

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF PACIFIC NORTHWEST UTILITIES,
AMICI CURIAE, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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BRIEF OF PACIFIC NORTHWEST UTILITIES.

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INTEREST OF AMICI CURIAE

Much of the electrical generating capability in the Pacific Northwest is hydroelectric. This brief is filed on behalf of ten Pacific Northwest utilities, which are individually described in Appendix A. Some of these utilities are publicly owned and some are investor owned. Some are located in the State of Washington and some are located elsewhere. These amicus parties own and operate many of the largest nonfederal projects in the Pacific Northwest.

For many purposes, these utilities are competitors. They share, however, a united interest in and concern about the critical need to maintain the long-standing coordinated planning and operation of the Pacific Northwest's regional hydroelectric system. As explained below, it is imperative that these utilities operate their separate projects in coordination with one another. That coordinated operation

would be impossible if each individual state could determine unilaterally the minimum streamflows for each hydroelectric facility within its borders.

SUMMARY OF ARGUMENT

Congress intended, and for good reason, that final authority for determining the conditions of hydroelectric project licenses be vested in the Federal Energy Regulatory Commission ("FERC"). Congress has placed certain authority concerning water quality standards in the hands of the states. However, Congress did not intend to give the states veto power over hydroelectric licenses by authorizing them to impose license conditions which are in any way water-related. When the states have asked for that kind of veto power, Congress has refused to provide it.

The Pacific Northwest provides excellent examples of the importance of coordination in the operation hydroelectric projects and of the process of attaining that coordination. Many different, and often conflicting, interests must be taken into account. Individual Pacific Northwest project licenses

illustrate how FERC accommodates interests as diverse as flood control and navigation, the needs of nuclear installations, fish and wildlife protection, archaeological survey and salvage, recreation, the rights of Indian tribes, the jurisdictional concerns of states and local governments, and federal rights and obligations under the Columbia River Treaty with Canada. Those illustrative licenses make it clear that regulatory constraints unilaterally imposed by individual states would have impacts far beyond the borders of those states. They would render the highly complex and coordinated hydroelectric system in the Pacific Northwest unworkable.

The Federal Power Act, as recently amended in the Electric Consumers Protection Act of 1986, provides for meaningful state participation in decisions about hydroelectric power. However, Congress never intended that the final decisions about project licenses be in the hands of the states. Rather, it has assigned to FERC both the responsibility to carry out federal policies and the ultimate authority which is necessary to meet that responsibility.

ARGUMENT

The purpose of this amicus brief is not to duplicate the arguments presented in the petition for writ of certiorari. Rather, it focuses on two aspects of the context in which the issues presented by the petition should be considered in order to show that much more is at stake in this case than the fate of individual hydroelectric projects.

First, this brief addresses the legal context: the proper relationship between Section 401 of the Clean Water Act and the regulatory system which Congress has created for the licensing of hydroelectric projects on the nation's waters.

Second, it describes the practical context: the operation of the hydroelectric system in the Pacific Northwest, where this case arose.

- I. In the Clean Water Act Congress Created a Narrow Exception to FERC's Paramount Licensing Authority To Allow the States To Enforce Their Water Quality Standards. Congress Did Not Intend To Allow the States To Dictate. Without Review by FERC. Other

Water-Related Conditions of Hydroelectric Project Licenses.

The Washington Supreme Court has held in this case that the states may unilaterally impose minimum streamflow requirements, or other water-related requirements, as conditions of a federal license to operate a hydroelectric facility. Because most aspects of the construction and operation of a hydroelectric project can be viewed as water-related, the court's rationale allows the state to impose conditions addressing a broad range of issues. As demonstrated by the facts of this case, the conditions may be so onerous as to give the state a de facto veto power by rendering the project uneconomic. FERC, the agency charged by Congress with comprehensive planning and licensing authority over the nation's hydroelectric facilities, has concluded that it cannot review or modify those conditions, even when it believes they are legally improper. See Town of Summersville, 62 F.E.R.C. ¶ 61,291 (1992),

reh'g denied 63 F.E.R.C. ¶ 61,037 (1993); Central Maine Power Co., 52 F.E.R.C. ¶ 61,033 (1990).

The Washington State Department of Ecology expressly stated that, in order to protect fisheries, it was requiring minimum streamflows in excess of those required to maintain water quality (App. 83a-84a). The Washington Supreme Court mistakenly found the state's authority to create such minimum requirements in Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The Washington Supreme Court's interpretation of Section 401 is in direct conflict with that of the New York Court of Appeals in In re Power Auth. v. Williams, 457 N.E.2d 726, 730 (N.Y. 1983) (holding, because of the preemptive jurisdiction granted by the Federal Power Act to the Federal Energy Regulatory Commission, that "[t]he section 401 certification process is accomplished by a determination that a proposed project will meet the particular water quality standards for the applicable classification.")

As shown by the petition, the Washington Supreme Court's decision is wrong as a matter of law.¹ It is also highly disruptive of the scheme of paramount federal authority over hydroelectric facility licensing which Congress fashioned long ago.

In First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946), this Court held that the Federal Power Act ("FPA") created exclusive federal authority over hydroelectric facility licensing -- an authority which leaves no room for conflicting state controls. That reading of the FPA was recently reaffirmed in California v. F.E.R.C., 495 U.S. 490 (1990), in which the Court pointed out that Congress itself,

¹Streamflow requirements to protect fisheries are not "water quality" requirements within the meaning of the Clean Water Act. The Clean Water Act itself distinguishes between streamflow requirements to protect water quality and streamflow requirements for fish and wildlife. 33 U.S.C. § 1252(b)(2). Moreover, under Section 401(a) of the Act, 33 U.S.C. § 1341(a), state certification is required only if the activity for which a permit is sought is one which may result in a discharge. The removal of water from a stream is not a "discharge" (nor is it "water pollution" as the Washington Supreme Court held).

when it enacted the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 ("ECPA"), reaffirmed First Iowa's understanding that the FPA established a paramount federal regulatory role. 495 U.S. at 499.

When Congress creates exceptions to FERC's paramount power to determine the conditions of hydroelectric licenses, it does so clearly and specifically. See, e.g., Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). Where water quality is concerned, Congress has decided that a hydroelectric project should not be licensed unless it can operate in compliance with water quality standards. Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), authorizes the states to place mandatory water quality conditions, which FERC treats as beyond its power to review, on those licenses. Congress has not, however, authorized the states to create such conditions in connection with water quantity for fisheries, or the many other state concerns which can be related to the use of water. In fact, although the states have asked Congress in the past

for the kind of veto power which the State of Washington asserts in this case, Congress has refused to grant that power.

The states asked Congress to grant to them, in ECPA, authority to set mandatory minimum streamflows to protect fisheries. See Rock Creek Limited Partnership, 38 F.E.R.C. ¶ 61,240, n.8; H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 23-25 (1986). Congress clearly and unequivocally refused to grant the states that authority. Instead, Congress added new Section 10(j) to the FPA,² requiring that FERC include in hydroelectric licenses conditions to protect fish and wildlife.

FERC decides what those conditions will be; the states do not. In establishing license conditions FERC must take into account the recommendations of state fisheries agencies, and must affirmatively and clearly justify any decision not to adopt them.³ They remain recommendations, however.

²16 U.S.C. § 803(j). ECPA contains related amendments to Sections 4(e) and 10(a), 16 U.S.C. §§ 797 (e), 803(a).

³Each license issued by FERC "shall include conditions for * * * protection, mitigation, and enhancement" of fish and wildlife. 16 U.S.C. § 803(j)(1). Those conditions "shall be

(continued...)

Congress specifically determined that FERC was not automatically to be bound by them. Although the new Section 10(j) of the FPA "certainly upgrade[d] statutorily the importance and status of fish and wildlife recommendations," it did "not give such agencies a veto, nor [did] it give them mandatory authority." H.R. Conf. Rep. No. 934, supra, at 25.

Congress thus specifically addressed state fish and wildlife concerns in the hydroelectric licensing process. Congress expressly granted the states a substantial and influential voice in the FERC proceedings. At the same time Congress deliberately refused to give the states the last word. It is FERC, not the states, that Congress has charged with the ultimate authority to balance and provide for the protection of local fish and wildlife interests, and also local

³(...continued)

based on recommendations" from state fish and wildlife agencies, among other sources. Id. If FERC chooses not to adopt any such recommendations, it must justify that choice by published findings explaining how adoption of the recommendation in question would be inconsistent with law. 16 U.S.C. § 803(j)(2).

interests in such matters as flood control, safety, recreation, land-use planning, and aesthetics.

The states would have had no need to seek authority under ECPA to dictate minimum streamflows for fisheries if they had already had that very authority under the Clean Water Act for more than a decade.⁴ If, as the Washington Supreme Court held in this case, Section 401 of the Clean Water Act had authorized the states to unilaterally impose minimum flows as mandatory conditions of federal licenses since 1972, Congress would not have needed to "upgrade" the status of the states' streamflow recommendations in 1986.

The reasons why Congress has been unwilling to give ultimate authority to the states are not difficult to understand. Such a power granted to the individual states would necessarily be exercised to protect the states' own local interests. The State of Washington's Water Resources Code,

⁴And see S. 1081, 102nd Congress, which would have amended the Clean Water Act to give states the authority, which Washington now claims it already had, to impose additional water-related requirements on federal licenses.

for example, expressly provides that its purpose is to set water resource policy which will

. . . ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington.

Wash. Rev. Code § 90.54.010 (emphasis added).⁵

Under the FPA, however, Congress has determined that hydroelectric facility licensing decisions must be governed by national, not parochial, concerns. The 1986 ECPA amendments provide assurance that the states' perspective on the protection of fish and wildlife will receive careful consideration in FERC licensing proceedings. As shown in Part II of this brief, FERC takes that responsibility seriously and does in fact take into account a wide variety of

⁵Similarly, the Montana Water Use Code embodies that state's policy to provide for the utilization, development, and conservation of the state's waters "for the maximum benefit of its people," Mont. Code Ann. § 85-2-101(3), and Oregon's water resources policy is guided by a legislative finding that utilization and control of the state's water resources is important to the "economic and general welfare of the people of the state and development of this state for the increased economic and general welfare of the people thereof." Or. Rev. Stat. § 536.220(1).

issues and interests which it considers from the perspectives of many parties, including the state agencies charged with the protection of fish and wildlife.

The system has been working the way Congress intended. It cannot continue to do so, however, if each state can unilaterally set the streamflow requirements for every hydroelectric project within its borders.

The Washington Supreme Court's decision transforms what Congress intended to be a limited and specific authority to enforce state water quality standards into a broad and ill-defined unilateral state power to impose virtually any water-related condition. If this and similar decisions by other state courts⁶ are allowed to stand, Congress engaged in a sterile and meaningless exercise when it enacted Section 10(j) of the FPA.

II. The Complex but Coordinated Hydroelectric System in the Pacific Northwest Illustrates the Importance of

⁶See Petition for Writ of Certiorari pp. 16-17.

FERC's Paramount Authority in the Licensing Process
and Why This Court Should Grant Certiorari.

The issue presented by this case will be faced over and over again in individual project licensing proceedings.⁷

However, this case is extremely important for reasons which go beyond the number of individual projects which may be affected. License conditions which are imposed on one hydroelectric project can profoundly affect others as well, including projects in other states. The complex and interrelated nature of the hydroelectric system in the Pacific Northwest, and the detailed coordination involved in the operation of that system, show why and how that is true.

A. The Pacific Northwest Coordination Agreement

At least in the Pacific Northwest, individual hydroelectric projects cannot be considered and evaluated in isolation. Since the early 1960's, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated to provide substantial benefits to the

⁷See Petition for Writ of Certiorari p. 3, n.3.

public in the Pacific Northwest states and in Western Canada. The parties to the Pacific Northwest Coordination Agreement include fifteen public and investor-owned utilities that own and operate hydroelectric facilities as well as the Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over a hundred hydroelectric plants, including twenty-one projects owned and operated by the United States government. Because the Bonneville Power Administration is a member of the coordinated system, any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

One important impetus for the Coordination Agreement was the Columbia River Treaty between the United States and Canada, signed in 1961.⁸ Pursuant to that

⁸Treaty between Canada and the United States of America relating to the cooperative development of the water
(continued...)

treaty, large storage reservoirs have been constructed in Canada. Those reservoirs contribute to regulation of the flow and provide downstream power benefits at various hydroelectric projects in the United States. The benefits are shared with Canada.

A primary purpose of the Coordination Agreement is to optimize firm power production throughout the Pacific Northwest and, at the same time, to provide for non-power uses of water resources. Under the Agreement each project must be operated within applicable legal and regulatory constraints. The Agreement also implements the Columbia River Treaty with Canada.

Each year the coordinated system utilities, BPA, the Army Corps of Engineers and the Bureau of Reclamation plan the operation of all projects in the system for the next operating year. This planning is done on a system-wide basis as though all projects were under unified ownership and

⁸(...continued)
resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244.

control. The result is a detailed hydroelectric regulation program which defines the limitations on drafting and refilling of all reservoirs. The benefits of coordination are equitably distributed through a complex contractual arrangement. Daily adjustment and fine-tuning of the coordinated plan are made necessary by many variables, including especially the weather.

Runoff in the region is highly variable and does not occur in the same pattern as do electric power requirements and fish migration requirements.⁹ The system's total storage capacity will accommodate less than half the total annual runoff, even in a below-average year. Thus the benefits of a large portion of the annual runoff must be captured within a short time or be lost forever.

Taking such constraints into account, the coordinated system achieves a delicate balance among utility load

⁹For example, in the Columbia River Basin, monthly mean unregulated streamflows can range from 40,000 cfs in January to 1,240,000 cfs in May, and annual runoff has ranged from 78 to 193 million acre-feet.

requirements, reservoir storage capacity, and streamflow needs.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, such things as minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around the turbines, maximum outflows, tail water restrictions, and the specific operational constraints of each of the projects.

B. The Importance of FERC's Paramount
Licensing Authority

The result of the process described above is a regional system which is coordinated hydraulically, electrically, contractually, and economically. As a consequence, the terms

of a single project license in the Pacific Northwest can have interstate and even international effects. To the extent that FERC has the final authority to determine the conditions of hydroelectric licenses, there is a single forum in which such potential long-range effects can be considered and balanced. To the extent that individual states can dictate those conditions, the other projects in the system -- including the federal projects -- are at the mercy of individual states acting to protect their local interests.

Minimum flow requirements in particular can have a substantial impact on the ability of the system as a whole to optimize power production. They reduce the system's output and flexibility. Minimum flow requirements affect not only the individual project upon which they are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across interstate and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow

requirements on local projects, the economic viability of projects hundreds of miles downstream could be disrupted.

Because the Pacific Northwest hydroelectric system impacts many different entities and jurisdictions -- the states and their political subdivisions, the federal government, Canada, and various Indian tribes -- project license proceedings often produce conflict over issues such as flood control, irrigation, recreation, power production, international and Indian treaty rights, and fisheries. The fisheries issue itself frequently creates conflict between upstream and downstream entities. FERC's licensing process, governed by the FPA, provides mechanisms for considering and balancing these widely disparate interests.

A central feature of the FPA is Congress's commitment to coordinated study and comprehensive planning along an entire river system. National Wildlife Federation v. F.E.R.C., 801 F.2d 1505, 1507 (9th Cir. 1986). In the Pacific Northwest an "entire river system" often spans several states and may extend into Canada. The FERC

licensing process can accommodate and coordinate the many interests involved. To the extent that individual states can dictate the conditions of project licenses, the effectiveness of that process will be damaged.

Two Pacific Northwest examples illustrate the kind of multiple-interest accommodation involved in the exercise of FERC's authority.

1. The Wells Dam Example

Wells Dam, operated under FERC License No. 2149,¹⁰ is one of eleven dams located on the main stem of the Columbia River. The Columbia River has its origins in Canada. The volume of its flow in the Pacific Northwest states depends in part upon the operation of Canadian dams and reservoirs. Wells Dam is located in the State of Washington. The dam and its reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and private lands under the jurisdiction of various municipalities

¹⁰Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962.

and the State of Washington. Immediately upstream are two federal dams (Chief Joseph and Grand Coulee). Immediately downstream are other mid-Columbia dams. Further downstream the Columbia River becomes the boundary between Washington and Oregon where it is spanned by several federally-owned projects.

The Wells license requires coordination with other facilities, with utilities in both Washington and Oregon, and with the Bonneville Power Administration which markets federal power in the Pacific Northwest. Under the terms of the license FERC can, if necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game, among others, participated before FERC in developing the details of that requirement.

The license also recognizes that the Wells reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires the Wells Dam

licensee to reimburse the Corps if that encroachment should interfere with power production.

The license also prescribes how the dam will be operated, for flood control, in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

The many competing interests addressed by the Wells Dam license include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife, archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system. In addition to the fisheries interests of the State of Washington, the license addresses the interests of other states

in anadromous fish,¹¹ tribal interests in treaty fishing rights, and federal interests in the anadromous and ocean fisheries.

2. The Priest Rapids Dam Example

The history of Priest Rapids Dam provides another example of the importance of FERC's authority. The original Priest Rapids license, issued in 1955, provided for minimum flows which had to be coordinated with releases from a number of upstream dams including two, Grand Coulee and Chief Joseph, which are federally owned. Determination of those original minimum flows had required FERC to balance, in addition to all of the interests described in the discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford Nuclear Reservation immediately downstream.

In 1976 nests of salmon eggs downstream from Priest Rapids Dam were harmed during fluctuating flows. The

¹¹In Pacific Northwest rivers, salmon and steelhead trout migrate downstream to the Pacific Ocean where they remain two to four years before returning upstream to spawn in the streams where they were hatched.

affected state fisheries petitioned FERC to amend the Priest Rapids license to increase the minimum flows almost twofold. With the help of FERC's Administrative Law Judges, the licensee and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests.

Eventually the interested parties, under FERC's auspices, reached a landmark long-term settlement agreement which creates a sliding scale of minimum flows based on how much spawning occurs at various water levels.¹² The ability of Priest Rapids to meet its minimum flow requirements without severe and imprudent reservoir drafts, adversely affecting power production or recreational facilities, depends on releases from upstream federal storage projects. BPA is a party to this settlement and has agreed to provide releases

¹²Setting minimum flow requirements too high can devastate fish populations. Spawning occurs at the edge of a stream in the shallows. The eggs can be exposed and destroyed if the water level was too high during spawning because of high minimum-flow requirements and, for example, was later lowered by drought or other conditions.

from the Chief Joseph Dam to enable Priest Rapids to meet the new minimum discharge requirements. Two local utility districts also agreed to provide compensated reservoir draft at their upstream projects to assist Priest Rapids.

The parties involved in this settlement, which was approved by FERC and arrived at under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service,¹³ the Oregon Department of Fish and Wildlife,¹⁴ BPA, various local utility districts, and three sovereign Indian Tribes (the Yakima, Umatilla and Colville tribes) which have treaty fishing rights and are not, by and large, subject to state jurisdiction.

The disruptive effect of the Washington Supreme Court's decision on FERC's procedures is already being seen. The Washington Department of Ecology's instream flow

¹³Salmon and steelhead trout may be caught in the Pacific Ocean where they mature before returning upriver to spawn.

¹⁴Many of these fish are spawned and caught on the Oregon side of the Columbia River.

regime in this case renders Tacoma's proposed project economically infeasible (Petition for Writ of Certiorari p. 15). A third licensing example from the Pacific Northwest shows how the Washington Supreme Court's decision has disrupted the process of balancing and accommodation.

3. The White River Project -- An Example of the Problem

The White River Project, FERC No. 2449, is an existing project constructed in 1910-11 owned by Puget Sound Power & Light Company ("Puget Power"). Puget Power's license application for the project is currently pending before FERC.

In FERC's environmental assessment its staff preliminarily concluded, pursuant to Section 10(j) of the FPA, that instream flow regimes recommended by federal and state fish and wildlife agencies were inconsistent with the FPA, and proposed an alternative flow regime for the project.¹⁵ It

¹⁵See 57 Fed. Reg. 48212, October 22, 1992, announcing availability of environmental assessment.

estimated that, as compared to the FERC staff proposal, the fish and wildlife agencies' flows would result in approximately \$3,000,000 per year of lost power production during each year of the term of the 40 year license, with very little additional potential benefit to the White River fishery. FERC's determination triggered further efforts "to resolve the inconsistency" under Section 10(j)(2). Puget Power requested that FERC hold an evidentiary hearing.

However, on April 29, 1993 (just weeks after the Washington Supreme Court's decision in this case), the Washington Department of Ecology imposed the fisheries agencies' flow regime as a condition of a Section 401 Certification for the White River Project. As a result, FERC concluded that there would be no point in holding further hearings on the instream flow issues.¹⁶

¹⁶FERC said:

Because no party had suggested that higher minimum flows are needed, and the staff's recommended instream flows are lower than those required in the certification, no purpose
(continued...)

C. Divided Authority Was Not Intended by Congress and Will Not Work.

The kind of accommodation of many competing interests which was accomplished in the Wells Dam license and the Priest Rapids Dam settlement was possible because FERC had ultimate authority over the conditions of the licenses. A state which could, without FERC's consent, unilaterally impose minimum flow requirements on projects within its borders would often have little or no incentive to cooperate in modifying those requirements to accommodate the interests of other states or those of the federal government in connection with its own hydroelectric projects. Other states and other project owners, including the federal government, would not have access to a forum with the

¹⁶(...continued)
would be served by holding an evidentiary hearing on instream flow issues.

Puget Sound Power & Light Company, 64 FERC ¶ 61,045 (July 9, 1993).

authority to insure that their interests were given appropriate consideration.

Congress has never consented to a system of dual authority over questions of instream flow; rather, it has recognized that such a system simply will not function. The Washington Supreme Court was mistaken when it found that very consent, which Congress has refused more than once to grant expressly, in a single, oblique, reference in Section 401(d) to "other appropriate" requirements of state law.

Congress has created a regulatory setting which encourages voluntary accommodations precisely because it places the final authority to determine streamflow requirements where that authority belongs: at the federal level. Experience has shown that even where extremely complex demands are placed upon that regulatory system, as in the Pacific Northwest, the system works. It cannot continue to do so effectively, however, under the rule of law announced in this case by the Washington Supreme Court.

CONCLUSION

For the reasons discussed above and in the petition, the Court should issue its writ of certiorari to the Washington Supreme Court.

Respectfully submitted,

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APPENDIX

THE PACIFIC NORTHWEST UTILITIES JOINING

IN THIS BRIEF AS AMICI CURIAE

I. PacifiCorp

PacifiCorp, dba Pacific Power & Light Company and Utah Power & Light Company, is an investor-owned electric power utility based in Portland, Oregon, and Salt Lake City, Utah. PacifiCorp supplies power to a variety of residential, commercial, and industrial customers. Its service areas cover parts of seven western states and include several million people.

PacifiCorp owns and operates 54 hydroelectric facilities in seven states, including seven facilities in Washington. These facilities have a combined nominal generating capacity of slightly more than 1,000 megawatts ("Mw"), of which about half is generated by the Washington facilities. Hydroelectric power constitutes approximately 15

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percent of PacifiCorp's total generating capacity, the remainder of which consists primarily of coal-fired generating plants. Because of the ability to adjust hydroelectric power generation rapidly, PacifiCorp relies heavily on its hydroelectric facilities to respond to daily, weekly, and seasonal fluctuations in power demand. In addition, PacifiCorp has responded to short-term load fluctuations through capacity purchases from the Bonneville Power Administration (BPA). The bulk of the capacity purchased through BPA is generated by hydroelectric facilities.

Nearly all of PacifiCorp's hydroelectric facilities, and all of its large facilities, are licensed by the Federal Energy Regulatory Commission. Many of these licenses will expire within the next few years and will require state certifications under section 401 of the federal Clean Water Act.

II. The Public Generating Pool and Its Members

The Public Generating Pool is a group of publicly-owned generating utilities located in the Pacific Northwest: City of Seattle, City Light Department (Seattle City Light);

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the City of Tacoma, City Light Department (Tacoma City Light); Chelan County Public Utility District (PUD); Cowlitz County PUD; Douglas County PUD; Grant County PUD; the Eugene Water & Electric Board (EWEB); and the Pend Oreille PUD.

The PGP utilities own hydroelectric facilities, licensed by FERC under the FPA, that have total nameplate ratings of nearly 700 Mw. These utilities serve nearly six hundred thousand retail customers. They are all interconnected through the BPA. As signatories to the Pacific Northwest Coordination Agreement, they coordinate their operations with the other privately and publicly-owned generating utilities in the Pacific Northwest as well as with BPA, the Corps of Engineers and the Bureau of Reclamation.

A. Seattle City Light

Seattle City Light owns four hydroelectric projects which have a total nameplate rating of 1200 Mw: Boundary, the Skagit Projects (Ross, Diablo and Gorge), Newhalem Creek, and Cedar Falls. It also purchases from five other

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hydroelectric projects, and has a FERC license for its project on the South Fork of the Tolt River, License No. 2459.

Seattle City Light's Skagit Project, License No. 553, includes Ross Dam whose reservoir is partially in British Columbia and is fed by Canadian streams. In addressing license revisions for that project, FERC has not only considered minimum flows suggested by the Washington Departments of Fisheries and Game, but has also required Seattle City Light to address British Columbia Basin matters and to consult with the International Joint Commission. Cf. Federal Power Commission, Opinion No. 808, July 5, 1977.

B. Tacoma City Light

Tacoma City Light has three federally-licensed hydroelectric projects which have a total rating of approximately 700 Mw. It also purchases from other hydroelectric facilities. Its projects involve rivers with high spring runoffs when compared to reservoir storage capacity. In these licenses in particular, FERC has had to balance federal Army Corps of Engineers flood control concerns with

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State of Washington instream flow recommendations for fish migration as well as with power production and other concerns.

C. Chelan County PUD

Chelan County PUD holds three federal licenses for hydroelectric facilities with a total rating of 1884 Mw, including two on the Columbia River: Rock Island and Rocky Reach. The Columbia River flows from British Columbia through Washington, then forms the border between Oregon and Washington until it empties into the Pacific Ocean. There are federally and nonfederally owned dams on the Columbia River and on its chief tributary, the Snake River. The Snake River originates in Wyoming, flows through Idaho, then forms the border between Idaho and Oregon and between Washington and Idaho before joining the Columbia River in Washington.

D. Cowlitz County PUD

Cowlitz County PUD holds the license for the Swift Project No. 2, License No. 2213, on the Lewis River. The

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project has a rating of 70 Mw and is operated in close conjunction with three nearby projects owned by the Pacific Power & Light Company. This license has provisions for federal navigation and flood control activities by the Army Corps of Engineers.

E. Douglas County PUD

Douglas County PUD owns the Wells Dam on the Columbia River. Wells has a rating of 820 Mw. The Wells license is described at pages 21-24 of this brief.

F. Grant County PUD

Grant County PUD owns two large federally-licensed hydroelectric facilities, Priest Rapids and Wanapum, on the Columbia River. Priest Rapids and Wanapum are rated at 788.5 and 880.4 Mw, respectively. The history of the Priest Rapids license is described at pages 24-26 of this brief. Grant County PUD also purchases from several small hydroelectric projects.

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G. Eugene Water & Electric Board

The Eugene Water & Electric Board has three federally licensed projects on the McKenzie River in Oregon with a nameplate rating of 111.5 Mw. In 1973, the State of Oregon acknowledged FERC's authority to set minimum flows on this stream when it asked EWEB to request that FERC modify the minimum flow requirements under EWEB's federal license No. 2496 at Leaburg Dam, which was done and approved by FERC.

H. Pend Oreille PUD

Pend Oreille PUD owns the 64 Mw Box Canyon Project (FERC License No. 2042) on the Pend Oreille River in Washington. It also owns the Sullivan Creek Project (FERC Project No. 2225) which it operates under the Pacific Northwest Coordination Agreement, to provide storage but no generation of its own. Pend Oreille PUD also has capacity purchase rights from Seattle City Light's Boundary Project.

III. Puget Sound Power & Light Company

Puget Sound Power & Light Company is the largest investor-owned electric utility in the State of Washington. It serves 1.5 million people within a 4,500 square mile service area.

Puget Power is highly dependent upon hydroelectric power to serve the needs of its almost 800,000 customers. In 1992 more than 50 percent of Puget Power's load was served from hydroelectric resources: company-owned hydroelectric facilities, purchases under long-term contracts from hydroelectric projects on the mid-Columbia River owned by PUDs, and other purchases of hydroelectric power. Puget Power currently has two federally-licensed projects, the Baker River and Snoqualmie Falls projects. It also has four hydroelectric license applications pending before FERC. One of those pending applications is for a new project (Thunder Creek), and three propose expansion at existing projects (White River, which is discussed at pages 27-29 of this brief, Snoqualmie Falls and Nooksack Falls).